SRI FERRINGHI SDN BHD

v.

YAP CHOON ENG & ORS

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-211-1992]
9 APRIL 1999

CIVIL PROCEDURE: *Pleadings - Striking out defence - Rules of the High Court 1980, O. 18 r. 19 - Whether defence frivolous and vexatious - Whether an abuse of process of the court - Striking out application - Delay - Whether fatal to application - Whether injustice caused to defendant*

LANDLORD AND TENANT: *Occupation - Occupation of land since 1927 - No right to exclusive possession of land - Non-payment of rents - Whether Control of Rent Act 1966 applicable - Whether lengthy duration of occupation entitled defendant to lawful occupation*

This was the 1st defendant's appeal against the order of the Senior Assistant Registrar striking out its defence under O. 18 r. 19 of the Rules of the High Court 1980 upon the application made by the plaintiff.

The 1st defendant claimed ownership of a piece of land ('the said land') wherein the 2nd defendant claimed a tenancy and was using the premises as a restaurant, whilst the 3rd defendant claimed that he was an occupier. The 1st defendant alleged: (i) that he was lawfully occupying the said land; (ii) that he and his family had been occupying the said land since 1927; (iii) that he was a protected tenant by virtue of the Control of Rent Act 1966; and (iv) that he had not received the plaintiff's notice to cease trespass of the said land. Apart from this, the 1st defendant claimed that the plaintiff delayed in taking out the striking out application.

The plaintiff averred that it was the registered proprietor of the said land and claimed for vacant possession. The plaintiff alleged: (i) that the 1st defendant entered and occupied the said land without the consent or knowledge of the plaintiff; (ii) that the defendants had never paid any rentals to the plaintiffs; (iii) that the defendants were trespassers and were not protected by the Control of Rent Act 1966; (iv) that the defendants failed, refused or neglected to comply with its legal notices to cease trespass; (v) that the defendants were squatters; and (vi) that although the defendants claimed a tenancy, they could not state from whom they obtained the title from.

Held:

[1] A court will only exercise its powers to strike out pleadings in plain and obvious cases and where a claim or defence on the face of it is obviously sustainable. The power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a course of action or defence.

[2] It was not disputed that the plaintiff was the registered proprietor of the said land. Thus, the right or title of any occupier to possession of the said land must be that conferred by the plaintiff or in the case of a permissible sub-lease/sub-tenancy by the lessee/tenant of the plaintiff. Clearly and plainly, the 1st defendant had no right conferred by the plaintiff or tenant of the plaintiff to the possession of the said land or to any portion of the said land.

[3] The Control of Rent Act 1966 had no application as the relation of landlord and tenant did not exist between the plaintiff and the 1st defendant. Further, the 1st defendant was a trespasser to whom no notice was required to be given and notice if at all required to be given to the 1st defendant was given as the plaintiff's notice to the 1st defendant's solicitors was notice to the 1st defendant.

[4] The 1st defendant's claim that his family had been occupying the premises since 1927, was not a justiciable defence as the length or duration of occupation by a trespasser would not elevate him into a lawful occupier. Also, squatters have no rights, either in law or in equity.

[5] The delay in applying for a striking out application is not fatal. Delay can be explained and the delay in the instant case which had been satisfactorily explained by the plaintiff was not fatal as no injustice whatsoever had been caused to the 1st defendant. In fact, the 1st defendant only benefited from the delay.

[6] It was plain and obvious from an examination of the pleadings, affidavits and documents exhibited that the defence was manifestly unsustainable, frivolous, vexatious and a sham, and that the raising of that defence was a delaying strategy and in effect amounted to an abuse of the process of the court.

[Appeal dismissed.]

Cases referred to:

Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co [1892] 3 CH 274 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. UMBC [1993] 3 MLJ 36 ***(refd)***

Bank of China v. Asiaweek Ltd [1991] 2 MLJ 505 ***(refd)***

Blake v. Albion Assurance Society [1876] 45 LJCP 663 ***(refd)***

Chanan Singh v. Thiyagaletchumi [1965] 2 MLJ 158 ***(refd)***

Christie v. Christie [1873] LR 8 Ch 499 ***(refd)***

Goh Koon Suan v. Heng Gek Kiau [1991] 2 MLJ 307 ***(refd)***

Goyner v. Central Wheelbase Ltd, The Times, 1 April 1993 ***(refd)***

Lai Seng Fook v. Tang Kong Low [1978] 1 MLJ 158 ***(refd)***

Lawrence v. Lord Norreys [1890] 15 App Cas 210 ***(refd)***

McPhail v. Persons, Names Unknown [1973] 1 Ch 447 ***(refd)***

Millington v. Loring [1881] 6 QBD 190 ***(refd)***

Ng Kian Chong v. Saw Seng Kee [1994] 4 CLJ 857 ***(refd)***

Norman v. Matthews [1916] LJKB 857 ***(refd)***

Ong Lean Sim & Anor v. Tio Kah Hin & Ors [1985] 1 MLJ 270 ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(refd)***

Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd. [1993] 3 MLJ 16 ***(refd)***

Re R, decd, [1950] 2 All ER 17 ***(refd)***

Sidek bin Haji Muhammad & 461 Ors v. The Government of the State of Perak [1982] 1 CLJ 244 ***(refd)***

Street v. Mountford [1985] 1 AC 809 ***(refd)***

Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 ***(refd)***

Tractors Malaysia v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***

Tucker v. Collinson [1886] 34 WR 354 ***(refd)***

Young v. Holloway [1895] P 87 ***(refd)***

Willis v. Earl Beauchamp [1886] 11 PD 59 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b-d)

Other sources referred to:

Black's Law Dictionary, 6th edn

Civil Court Actions, Odgers, p 208

Supreme Court Practice 1997, vol 1, para 18/19/4

The English Supreme Court Practice 1995, vol 1 para 18/19/6

For the plaintiff - Karina Yong Ker-Ai; M/s Khoo Heng Choon

For the 1st defendant - Habib Rahman Seeni Mohideen

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

This is the 1st defendant's appeal to judge-in-chambers against the order of the learned Senior Assistant Registrar, dated 8 October 1997, striking out the 1st defendant's defence, under O. 18 r. 19 of the Rules of the High Court 1980.

On 21 August 1997 (encl. 30), the plaintiff applied to strike out the 1st defendant's defence, under all of the grounds provided in r. 19(1). However, the court was informed, both by Mr Habib for the appellant and Miss Tejpreet Kaur for the respondent, that the 1st defendant's defence was specifically struck out under r. 19(1)(b). And Miss Tejpreet further informed, with regard to this appeal, that she was relying only on r. 19(1)(b), which reads:

> The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in the pleading or in the indorsement, on the ground that it is scandalous, frivolous or vexatious, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The ordinary dictionary meaning of the word "scandalous" is "shameful" or "disgraceful". But a pleading stating a scandalous fact does not make that pleading scandalous, so long as it is relevant (*Millington v. Loring* [1881] 6 QBD 190) and is wholly necessary for the due prosecution of the action (*Re R, decd.*, [1950] 2 All ER 17) "The sole question (when considering whether a pleading is scandalous) is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading, which is material with reference to the relief prayed," per Selborne LC, in *Christie v. Christie* [1873] LR 8 Ch 499.

Nevertheless, if degrading charges be made, which are irrelevant, or if, though the charge be relevant, unnecessary details of a scandalous fact are given, the pleading becomes scandalous (*Blake v. Albion Assurance Society* [1876] 45 LJCP 663).

By "frivolous or vexatious" is meant a case which is obviously frivolous or vexatious: Per Lindley LJ in *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co,* [1892] 3 CH 274, 277. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court": Per Jeune P, in *Young v. Holloway* [1895] P 87, 90. Indeed, in *Bank of China v. Asiaweek Ltd.* [1991] 2 MLJ

505, 512, Thean J held that a hopeless and vexatious defence constitutes an abuse of the process of the court. In *Norman v. Matthews* [1916] LJKB 857, 859, Lush J propounded the test as follows:

> In order to bring a case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that his alleged cause of action is one which on the fact of it is clearly one which no reasonable person could properly treat as *bona fide*, and contend that he had a grievance which he was entitled to bring to court.

In a striking out application under r. 19(1)(b-d), "affidavit evidence may be and ordinarily is used" (*The English Supreme Court Practice* 1995, vol 1 para 18/19/6). "It is settled beyond doubt that affidavit evidence is always admissible under an application made under other paragraphs of the first sub-rule or under the inherent jurisdiction of the court. See *Tractors Malaysia v. Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd.* [1993] 3 MLJ 16" (*Owen Sim Liang Khui v. Piasau Jaya Sdn. Bhd. & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 at 122 per Gopal Sri Ram JCA).

A court will only exercise its powers to strike out pleadings only in plain and obvious cases. In *Bandar Builder Sdn. Bhd. & Ors. v. UMBC* [1993] 3 MLJ 36, the former Supreme Court firmly reiterated, (i) that the principle upon which the courts act in exercising its power under any of the four limbs in r. 19(1) is only in plain and obvious cases that recourse should be had to this summary process, (ii) that this summary process can only be adopted when it can clearly be seen that a claim or defence is on the face of it obviously unsustainable, and (iii) that that power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a course of action or defence. "It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases (*Lawrence v. Lord Norreys* [1890] 15 App Cas 210, 219 per Lord Herschell). It follows that an order will be made only in cases where it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed" (see Odgers on *Civil Court Actions* at p. 208), or would produce no good result (*Willis v. Earl Beauchamp* [1886] 11 PD 59, 63 per Cotton LJ) or practical result (*Goh Koon Suan v. Heng Gek Kiau* [1991] 2 MLJ 307), or lead to no possible good (*Willis v. Earl Beauchamp (supra)* at 63 per Bowen LJ).

In the present case, the pleadings are as follows. The plaintiff averred, in the statement of claim, that they are the registered proprietors of land held under Geran Pendaftaran 20438 for Lot 50, s. 1, Bandar Batu Ferringhi,

Daerah Timur Laut, Pulau Pinang (said land). The plaintiff further averred that the 1st defendant claims ownership of premises known as 206-B, Batu Ferringhi, Pulau Pinang (said premises) erected on the said land, that the 2nd defendant claims that he is a tenant, since 1985, of the 1st defendant, and uses the said premises as a restaurant known as "Restoran Happy Garden", and that the 3rd defendant claims that he is an occupier of the said premises. At all material times, the plaintiff is entitled to exclusive possession of the said land. The defendants unlawfully entered and or occupied a portion of the said land, and or unlawfully erected or permitted to be erected an illegal structure on a portion of the said land, and or unlawfully occupied the said structure erected on the said land. They issued legal notices, to the 2nd defendant on 24 December 1991 and to the 1st and 3rd defendants on 2 June 1992, to cease their trespass. The defendants failed, refused and or neglected to comply with its notice. And the plaintiff claims, from the defendants, for vacant possession of the said land.

The 1st defendant pleaded, in his joint defence with the 3rd defendant, as follows. He has no knowledge that the plaintiff is the registered proprietor of the said land. It is admitted, that he claims ownership of the said premises, that the 2nd defendant claims that is a tenant of the 1st defendant since 1985, and that the 2nd defendant uses the said premises as a restaurant known as "Restoran Happy Garden". He had not unlawfully entered and or occupied a portion of the said land, and or unlawfully erected or permitted to be erected an illegal structure on a portion of the said land, and or unlawfully occupied the said structure erected on the said land. The 1st and 3rd defendants are lawful tenants. The families of the 1st and 3rd defendants had been permitted, since 1927, to occupy the said land. He is not unlawfully occupying the said premises. He is a protected tenant, protected by the Control of Rent Act 1966. He had not received the plaintiff's notice. He was not obliged to comply with the said notice. Since 1927, he has been occupying the said land. The plaintiff's notice was not in compliance with law and need not be observed. It is denied, that he failed, refused and or neglected to comply with the said notice, that he intends to continue with his trespass, and or that the plaintiff is denied the use and enjoyment of the said land. He paid the quit rent.

With regard to the affidavit evidence, the plaintiff's project manager (Goh Geok Boon) deposed in his affidavit affirmed on 13 August 1997 in support of the striking out application, as follows. Thus far, the plaintiff had not taken any action (meaning a striking out application) against the 1st and 3rd defendants, as the plaintiff was proceeding against the 2nd Defendant, who was apparently the occupier running the restaurant. He has been

advised that the 2nd defendant's appeal to judge-in-chambers seeking to set aside the default judgment entered by the plaintiff against the 2nd defendant has been dismissed with costs. The plaintiff is the registered proprietor of the said land, and the denial of the defendants is frivolous or vexatious. Unlawfully, the 1st defendant entered and occupied the said land and erected a structure on the said land, without the consent or knowledge of the plaintiff. The Defendants are not lawful tenants. The defendants had never paid any rentals to the plaintiffs. Being trespassers, the defendants have no right to occupy the said land, and the defendants are not protected by the Control of Rent Act. The defendant's claim of a right of occupation is without basis. The 1st defendant agreed, in his letter dated 15 May 1985 (exh. GGB3) that he had no right to occupy the said land and that he would deliver up the said premises, when it is required by the plaintiff. The 1st defendant addressed letter (GGB3) to Hong Leong Property Management Sdn. Bhd., the parent company of the plaintiff. The plaintiff undoubtedly issued the said notice to the defendants and denial of the defendants is frivolous or vexatious. By letter dated 6 March 1992 (exh. GGB4), Messrs Tharuma & Associates requested all correspondence to the 1st defendant to be forwarded to them, as the solicitors for the 1st and 3rd defendants. And by letter dated 2 June 1992 (GGB5), Messrs Tharuma & Associates acknowledged receipt of the plaintiff's notices (GGB6, GGB7). In spite of the said notice, the defendants have failed and refused to deliver vacant possession of the said land to the plaintiff.

The 1st defendant deposed as follows. He is protected by the Control of Rent Act. He is not a trespasser. His family has been occupying the said premises, since 1927. He filed his defence in 1992. The reason for the delay in taking out the striking out application is not reasonable. The plaintiff's action against the 2nd defendant is not connected to him. He has been advised, that the dismissal of the 2nd defendant's appeal to judge-in-chambers does not bind nor concern him, and that the plaintiff's delay in taking out the application, and delay is a vital consideration in a striking out application, should not be tolerated. His defence is not frivolous or vexatious, as hitherto he was in contact with Hong Leong Property Management Co. Sdn. Bhd., who was negotiating this case with him. He did not know that Hong Leong Property Management Co. Sdn. Bhd. was not the owner of the said land. Exhibit "YCE-2" is the correspondence between him and Hong Leong Property Management Co. Sdn. Bhd. Since it is his defence that he is not a trespasser and that he is protected by the Control of Rent Act, he has been advised that serious issues have been raised. He paid his rent to Tan Teow Seang. The previous owner collected the rent. Although he was willing to pay his rent, no agent or representative

approached him for any rent. Exhibit GGB3 addressed the compensation relating to the business but not to the premises. It is denied that he had agreed not to receive any compensation relating to the premises. He was not able to know that the plaintiff and Hong Leong Property Management Co. Sdn. Bhd. were related companies. He resides in the said premises, about 2 or 3 times a month. The plaintiff's notice was received first by his solicitors, and he has been advised that the notice to his solicitors, although received, could not be taken as proper service on him. He has been advised that notice must be personally served on him.

Miss Tejpreet Kaur contended, in her oral submission, that the defendants are squatters. The defendants claim a tenancy and the protection of the Control of Rent Act. But they would not say from whom they obtained title. They denied receipt of the plaintiff's notice. But notice was received. The delay in taking out the application was because the plaintiff was proceeding against the 2nd defendant who was and is in physical occupation of the premises. The 1st defendant agreed to vacate the premises upon the request of the plaintiff. The defence is a sham.

Mr Habib retorted that the plaintiff had failed to elect the limb under which the application was made. There was undue delay in taking out this application. Mr Habib further added that the defendants obtained title from the plaintiff's predecessor in title, and that was not rebutted.

Miss Tejpreet replied that delay is not fatal, that there was no tenant/landlord relationship, and that squatters have no rights, to which Mr Habib swiftly responded that "the offer of a tenancy was not agreed as the terms were not agreeable to the defendants".

Undeniably, the 1st defendant claims, in his defence and affidavit, a tenancy of the said land and a right therefore of occupation of the said premises. But it is plain and obvious, from an examination of the pleadings, affidavits and documents exhibited, that the defence "is manifestly unsustainable, is frivolous and vexatious and a sham, and that the raising of that defence is a delaying strategy, and in effect amounts to an abuse of the process of the court" (see *Bank of China v. Asiaweek Ltd. (supra)* at 508).

It is trite that the relation of landlord and tenant arises as a rule, from a contract between the landlord and the tenant, whereby the landlord confers on the tenant the right to the exclusive possession of land for a time, and whereby the landlord is entitled, as a rule, to receive from the tenant payment for the use of the property in the shape of rent. A tenant is "one who occupies another's land or premises in subordination to such other's

title and with his assent, express or implied" (*Black's Law Dictionary*, 6th edn). "To constitute a tenancy, the occupier must be granted exclusive possession of a fixed or periodical term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier" (*Street v. Mountford* [1985] 1 AC 809, 818, per Lord Templeman).

It is not in dispute, more than evident anyway, that the plaintiff is the registered proprietor of the said land. This means, a *fortiorari*, that the right or title of any occupier to possession of the said land must be that conferred by the plaintiff, or, in the case of a permissible sub-lease/sub-tenancy, by the lessee/tenant of the plaintiff. Needless to say, there could not be an occupier with some colour of right or title to possession of the said land, if the plaintiff with the sole disposing power had not conferred in the first place some right or title to the possession of the said land.

It is also more than evident, that the 1st defendant is not a tenant of the plaintiff, as Mr Habib stated, but probably without realising the implication, that the 1st defendant had rejected the plaintiff's offer of a tenancy. And the 1st defendant is not a sub-tenant of a tenant of the plaintiff. Clearly and plainly, the 1st defendant has no right, conferred by the plaintiff or tenant of the plaintiff, to the possession of the said land or to any portion of the said land.

Probably desperate for any defence, the 1st defendant claims the protection of the Control of Rent Act. But the Control of Rent Act has no application, as the relation of landlord and tenant does not exist between the plaintiff and the 1st defendant (*Chanan Singh v. Thiyagaletchumi* [1965] 2 MLJ 158). The defendant contends that the plaintiff's notice was not received. But the 1st defendant is a trespasser, "to whom no notice is required to be given" (*Chanan Singh v. Thiyagaletchumi (supra)* at 160). And notice, if at all required to be given to the 1st defendant, was given, as the plaintiff's notice to Messrs Tharuma & Associates (GGB5) was notice to the 1st defendant (*Lai Seng Fook v. Tang Kong Low* [1978] 1 MLJ 158). The defendant contends, but only with bare assertions, that the plaintiff's notice was not valid and therefore need not be observed. But that is an obvious fallacy. The 1st defendant claims that his family has been occupying the premises since 1927. But there is not a justiciable defence, as the length or duration of occupation by a trespasser would not elevate him into a lawful occupier.

Undoubtedly, the 1st defendant is unlawfully occupying the said premises. The 1st defendant offered, on 15 May 1985, "to quit and move out [from] the said land", when the plaintiff intends to develop the said land. The plaintiff counter-offered a tenancy. The 1st defendant rejected the tenancy. But at that point, if not before, the 1st defendant, without any rights conferred by the plaintiff, was a trespasser. A few years later, on 2 June 1992, the plaintiff notified the 1st defendant to vacate from the said land. Yet, the 1st defendant remains, irascibly, on the said land. Miss Tejpreet dubbed the 1st defendant a squatter.

In *McPhail v. Persons, Names Unknown* [1973] 1 Ch 447, 456, Lord Denning stated thus:

> What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that the house or land was standing empty, doing nothing. But this plea is of no avail in law.

And squatters have no rights, either in law or in equity (*Sidek bin Haji Muhammad & 461 Ors v. The Government of the State of Perak* [1982] 1 CLJ 244; [1982] 2 MLJ 313).

The 1st defendant contends that the striking out application was not made promptly. In the case of *Tengku Ali ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 relied by Mr Habib, Idris Yusof J remarked that courts want striking out applications to be made promptly. For "although the rule expressly states that the (striking out) order may be made at any stage of the proceedings, still the application should always be made promptly. Where the defence or other subsequent pleading is being attacked, the application should be made as soon as practicable after the service of such defence or pleading" (*Supreme Court Practice 1997*, Vol 1, para. 18/19/4). But delay is not fatal. Delay can be explained (see *Ong Lean Sim & Anor v. Tio Kah Hin & Ors* [1985] 1 MLJ 270; *Ng Kian Chong v. Saw Seng Kee* [1994] 4 CLJ 857; [1994] 3 MLJ 691). "The application may be made even after pleadings are closed (per Brett M.R. in *Tucker v. Collinson* [1886] 34 WR 354) or the trial set down (*Goyner v. Central Wheelbase Ltd*, The Times, 1 April 1993)" (*Supreme Court Practice 1997*, vol 1, para. 18/19/4). And the delay in the instant case, which has been satisfactorily explained by the plaintiff, is not fatal, as no injustice whatsoever has been caused to the 1st defendant. In fact, the 1st defendant benefited only from the delay.

As said, the defence of the 1st defendant is frivolous and vexatious, devoid of all merit and is a sham. In a nutshell, the defence is an abuse of the process of the court. Accordingly, the 1st defendant's appeal to judge in chambers is hereby dismissed with costs.